Teoh Ching Hwa v Mohd Nor Arif bin Ahmad & Anor and another appeal

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NOS WA-12BNCVC-26-02 OF 2016 AND WA-12BNCVC-24–02 OF 2016
YEOH WEE SIAM J
1 NOVEMBER 2016

Road traffic — Negligence — Road accident — Damages — Appeal against quantum and liability — Accident between motorcyclist and pedestrian — Motorcyclist ran away after hitting pedestrian — Liability of 20% to pedestrian and 80% to motorcyclist — Whether rightly-apportioned — Whether awards given to pedestrian exorbitant — Whether pedestrian entitled to award for EPF — Whether pedestrian paid wages as def ined under s 2 of Employees Provident Fund Act 1991 — Whether awards reasonable and ought to be maintained

The plaintiff claimed against the defendants at the sessions court for special and general damages, interests and costs for losses arising from a road accident which occurred between the plaintiff, as a pedestrian, and a motorcycle ridden by the first defendant, which the plaintiff alleged, was in front of Shangri-La Hotel, Jalan Sultan Ismail. The second defendant was the owner of the motorcycle and the first defendant's father. Following the accident, the plaintiff suffered serious injuries and losses. The trial judge found the plaintiff negligent by 20% and the defendant negligent by 80%. The trial judge also awarded, inter alia, special damages amounting to RM61,880.80, general damages amounting to RM247,000 and loss of future earnings amounting to RM339,498.40. Both the plaintiff and the defendants appealed against the decision regarding liability and quantum. The defendants' appeal on liability was premised on the contention that the accident occurred in front of the Caltex Station ('Caltex') and facing the Hard Rock Cafe and Concorde Hotel which were across the road. The first defendant alleged that the plaintiff and his friend, SP3, were crossing at the middle of the road and failed to use the pedestrian crossing which was about 30 metres from the place of the accident. According to the first defendant, he was not negligent at all in the accident with the plaintiff. SP3 testified that he and the plaintiff had observed that the traffic light was red for cars, and had then crossed the road from Shangri-La Hotel. However, the first defendant had hit the lights at high speed and before SP3 could react, he heard a loud crashing sound. When SP3 turned to the left, he observed that the plaintiff had been thrown back to the pavement while the first defendant immediately ran away.

Held, affirming the decision of the sessions court judge on liability; allowing appeal in part regarding quantum:

(1) On the issue of liability, SP3's police report was a contemporaneous document, and ought to be accepted. The accident occurred at 3.35am and SP3's police report was lodged 1 hour 19 minutes after the accident when the incident was still fresh in SP3's mind. It was probably accurate that he and the plaintiff had crossed at the traffic light where the pedestrian crossing was. Meanwhile, the first defendant's police report was not a contemporaneous document. The first defendant only lodged his police report on 17 April 2011 ie, eight days after the accident. Nowhere in his police report did the first defendant state that the accident took place in front of Caltex, and near the Hard Rock Cafe and Concorde Hotel. The first defendant's version of the place of the accident was an afterthought which could not be accepted by the court (see paras 20–21).

(2) SP3's police report and evidence ought to have been considered in preference to the first defendant's evidence because the first defendant had made his police report eight days later. Not only that, the first defendant had immediately ran away after the accident, thereby showing that what SP3 was telling was probably the truth ie, that the first defendant hit the lights at high speed. Therefore, the first defendant was clearly more blameworthy than the plaintiff. It was obvious that the first defendant was more negligent than the plaintiff. The trial judge had not erred in deciding liability of 20% to the plaintiff and 80% to the defendants (see paras 28 & 32).

(3) On the issue of quantum, the plaintiff was not entitled to an award for EPF since he had not been paid the 'amount of wages' and 'wages' as defined in s 2 of the Employees Provident Fund Act 1991 ('EPF Act'), pursuant to his employment under a contract of service. It is only when the plaintiff is employed under a contract of service and is paid the amount of wages, or wages, then s 43 of the EPF Act is triggered to require the employer and employee to make their respective statutory contributions for EPF for the plaintiff, as the employee. If the plaintiff was not working and was not paid a monthly salary, there was no legal requirement for EPF contributions to be made (see para 42).

(4) The trial judge had awarded the global sum of RM160,000 as general damages for trauma head injury, which included the facial fractures. The judge had taken into account the plaintiff's impaired immediate and short term memory, impaired concentration and impairment of speech, even though the plaintiff could walk independently, was independent in his daily living activities and was able to reason and make sensible judgments. The trial judge had considered craniotomy and cranioplasty separately and yet came up with the award for a global sum which only

mentioned craniotomy. Therefore, the plaintiff's appeal to have another separate award for cranioplasty was not allowed. The award of RM160,000 was reasonable and fair, bearing in mind that the plaintiff's serious head injury and the plaintiff's impairment of memory and speech, and the plaintiff's facial fractures (see paras 47–48 & 50).

(5) It was acceptable that the medical costs to be awarded should be 1/3 of RM150,000 which amounted to RM50,000. However, the medical costs should not include the RM33,978 for speech therapy thereby causing the medical costs to go up. The 1/3 formula could not be used for the award for speech therapy as it could only be applied to the medical costs. The plaintiff suffered from impairment of speech and therefore would require speech therapy. The award of RM33,978 for speech therapy was affirmed but the order was varied, and allowed under a separate head from medical costs. This was for the reason that speech therapy was given after the plaintiff's surgery and medical treatment. That being the case, the award for speech therapy could not be included in the medical costs, but ought to be given as a separate award. The award of RM33,978 was not excessive or erroneous and should be maintained (see paras 52–55).

(6) A specialist report had stated that 'the potential to be employed in that position or similar jobs is slim considering his current neurological deficit'. Thus, the trial judge had correctly awarded loss of future earnings to the plaintiff. However, it would be wrong for the trial judge to take into account the plaintiff's volunteer work at the National Stroke Centre ('NSC') for calculating loss of future earnings considering that the plaintiff was then at the NSC just to mingle around with like patients, and to prevent depression from overcoming him. The award of RM339,498.40 for loss of future earnings was reasonable and ought to be maintained (see paras 57, 62 & 66).

[Bahasa Malaysia summary

Plaintif telah menuntut terhadap defendan-defendan di mahkamah sesyen untuk ganti rugi khas dan am, faedah dan kos untuk kehilangan yang timbul akibat kemalangan jalanraya yang berlaku antara plaintif, sebagai pejalan kaki, dan motorsikal yang ditunggang oleh defendan pertama, yang mana plaintif mengatakan, berada di hadapan Hotel Shangri-La, Jalan Sultan Ismail. Defendan kedua adalah pemilik motorsikal itu and bapa defendan pertama. Berikutan kemalangan itu, plaintif mengalami kecederaan serius dan kehilangan. Mahkamah perbicaraan mendapati plaintif cuai 20% dan defendan cuai 80%. Hakim perbicaraan juga mengawardkan, antara lain, ganti rugi berjumlah RM61,880.80, ganti rugi am berjumlah RM247,000 dan kehilangan pendapatan masa hadapan berjumlah RM339,498.40. Kedua-dua plaintif dan defendan-defendan telah merayu terhadap keputusan berkaitan liabiliti dan kuantum. Rayuan defendan-defendan berhubung liabiliti berpremiskan hujah bahawa kemalangan itu berlaku di hadapan Stesyen

Caltex ('Caltex') dan mengadap Hard Rock Cafe dan Hotel Concorde yang terletak di seberang jalan. Defendan pertama mengatakan bahawa plaintif dan kawannya, SP3, sedang melintas di tengah jalan itu dan gagal menggunakan lintasan pejalan kaki yang berada kira-kira 30 meter dari tempat kemalangan. Menurut defendan pertama, dia tidak cuai langsung dalam kemalangan itu dengan plaintif. SP3 memberi keterangan bahawa dia dan plaintif telah meneliti bahawa lampu isyarat adalah merah untuk kereta dan telah kemudian melintas jalan dari Hotel Shangri-La. Walau bagaimanapun, defendan pertama telah melanggar lampu itu pada kelajuan tinggi dan sebelum SP3 dapat bertindak, dia mendengar bunyi dentuman kuat. Apabila SP3 menoleh ke kiri, dia melihat plaintif telah terpelanting belakang ke kaki lima manakala defendan pertama dengan segera melarikan diri.

Diputuskan, mengesahkan keputusan hakim mahkamah sesyen berhubung liabiliti; membenarkan sebahagian daripada rayuan berkaitan kuantum:

(1) Berhubungan isu liabiliti, laporan polis SP3 merupakan dokumen semasa, dan patut diterima. Kemalangan itu berlaku pada 3.35 pagi dan laporan polis SP3 telah dibuat 1 jam 19 minit selepas kemalangan itu apabila kejadian itu masih segar dalam fikiran SP3. Ia berkemungkinan tepat bahawa dia dan plaintif telah melintas jalan di lampu isyarat di mana terdapat lintasan pejalan kaki. Manakala, laporan polis defendan pertama bukan dokumen semasa. Defendan pertama hanya membuat laporan polisnya pada 17 April 2011 iaitu, lapan hari selepas kemalangan. Tiada mana-mana dalam laporan polisnya yang defendan pertama menyatakan bahawa kemalangan itu berlaku di hadapan Caltex, dan dekat Hard Rock Cafe dan Hotel Concorde. Versi defendan pertama tentang tempat kemalangan adalah suatu yang telah difikirkan kemudian yang tidak boleh diterima oleh mahkamah (lihat perenggan 20–21).

(2) Laporan polis dan keterangan SP3 patut dipertimbangkan dengan keutamaan kepada keterangan defendan pertama kerana defendan pertama telah membuat laporan polisnya lapan hari kemudian. Bukan itu sahaja, defendan pertama telah melarikan diri dengan segera selepas kemalangan itu, yang menunjukkan bahawa apa yang diberitahu oleh SP3 berkemungkinan benar iaitu, bahawa defendan pertama telah melanggar lampu itu pada kelajuan tinggi. Oleh itu, defendan pertama jelas patut lebih dipersalahkan daripada plaintif. Ia jelas bahawa defendan pertama lebih cuai daripada plaintif. Hakim perbicaraan tidak terkhilaf dalam memutuskan liabiliti 20% kepada plaintif dan 80% kepada defendan-defendan (lihat perenggan 28 & 32).

(3) Berhubung isu kuantum, plaintif tidak berhak mendapat award untuk KWSP kerana dia tidak dibayar 'amount of wages' dan 'wages' sepertimana ditafsirkan dalam s 2 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP'), berikutan pekerjaannya di bawah kontrak

perkhidmatan. Ia hanya apabila plaintif bekerja di bawah kontrak perkhidmatan dan dibayar jumlah gaji, atau gaji, maka s 43 Akta KWSP terpakai untuk menghendaki majikan dan pekerja membuat caruman statutori mereka masing-masing untuk KWSP bagi plaintif, sebagai pekerja. Jika plaintif tidak bekerja dan tidak dibayar gaji bulanan, tidak ada keperluan sah untuk caruman KWSP dibuat (lihat perenggan 42).

(4) Hakim perbicaraan telah mengawardkan jumlah global RM160,000 sebagai ganti rugi am untuk trauma kecederaan kepala, yang mana termasuk keretakan muka. Hakim telah mengambil kira ingatan plaintif yang terjejas untuk jangka pendek dan semasa, kepekaan yang terjejas dan pertuturan yang terjejas, meskipun plaintif boleh berjalan dengan sendiri, boleh melakukan aktiviti kehidupan hariannya dengan sendiri dan mampu membuat pertimbangan yang waras dan munasabah. Hakim perbicaraan telah mengambil kira kraniotomi dan kranioplasti secara berasingan dan masih belum membuat award untuk jumlah global yang hanya menyatakan untuk kraniotomi. Oleh itu, rayuan plaintif untuk membuat satu lagi award berasingan untuk kranioplasti tidak dibenarkan. Award RM160,000 adalah munasabah dan adil, dengan mengambil kira kecederaan kepala serius plaintif dan ingatan dan pertuturan plaintif yang terjejas, dan keretakan muka plaintif (lihat perenggan 47–48 & 50).

(5) Ia boleh diterima bahawa kos perubatan yang patut diawardkan adalah 1/3 daripada RM150,000 yang berjumlah RM50,000. Walau bagaimanapun, kos perubatan tidak patut termasuk RM33,978 untuk terapi pertuturan yang menyebabkan kos perubatan naik. Formula 1/3 tidak boleh digunakan untuk award bagi terapi pertuturan kerana ia hanya boleh terpakai untuk kos perubatan. Plaintif mengalami pertuturan yang terjejas dan oleh itu memerlukan terapi pertuturan. Award RM33,978 untuk terapi pertuturan telah disahkan tetapi perintah telah diubah, dan dibenarkan di bawah kepala tajuk lain daripada kos perubatan. Ini adalah untuk sebab terapi pertuturan diberikan selepas pembedahan dan rawatan perubatan plaintif. Jika begitu kesnya, award untuk terapi pertuturan tidak boleh dimasukkan dalam kos perubatan, tetapi patut diberikan sebagai award yang berasingan. Award RM33,978 tidak melampau atau salah dan patut dikekalkan (lihat perenggan 52–55).

(6) Laporan pakar telah menyatakan bahawa 'the potential to be employed in that position or similar jobs is slim considering his current neurological deficit'. Oleh itu, hakim perbicaraan dengan betul telah mengawardkan kehilangan pendapatan masa hadapan kepada plaintif. Walau bagaimanapun, ia adalah salah untuk hakim perbicaraan mengambil kira kerja sukarela plaintif di Pusat Strok Kebangsaa ('PSK') untuk mengira kehilangan pendapatan masa hadapan dengan memandangkan plaintif

hanya di PSK untuk beramah mesra dengan pesakit-pesakit, dan untuk mengelakkan kemurungan membendung dirinya. Award RM339,498.40 untuk kehilangan pendapatan masa hadapan adalah munasabah dan patut dikekalkan (lihat perenggan 57, 62 & 66).]

Notes

For cases on road accident, see 11(1) *Mallal's Digest* (5th Ed, 2015) paras 485–496.

Cases referred to

Chock Kek Ling v Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120, HC (refd)
Lau Kung Kai v Abu Serah bin Bol (M) [2008] MLJU 352; [2008] 10 CLJ 245, HC (distd)
Muhamad Adib v Mohamad Azrul bin Ahmad [2015] 1 PIR 55, HC (refd)
Noor Asfizatul Ain bt Jamaluddin v Vicent Lai [2005] 1 PIR 19, HC (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Soh Hau Huat v Mohd Nor Taya & Anor [1992] 3 CLJ Rep 600 (distd)
Tengku Muhamad Hidayatullah bin Tengku Amran v Muhamad Syakir bin Ab Wahab [2015] 2 PIR 26, HC (refd)

Legislation referred to

Employment Provident Fund Act 1991 ss 2, 43
Highway Code Part IV, s 69

Leena Manaharan (Azim Tunku Farik & Wong) for the appellant.
S Ashok (Ravin Woodhull with him) (Kandiah Partnership) for the respondent.

Yeoh Wee Siam J:

INTRODUCTION

[1] On 26 September 2016 I heard the following two civil appeals together regarding the decision of the learned sessions court judge ('trial judge') dated 5 February 2016:

(a) Civil Appeal No WA-12BNCVC-26–02 of 2016 filed by the appellant/plaintiff ('the plaintiff') ('the plaintiff's appeal') on the issues of liability and quantum; and

(b) Civil Appeal No WA-12BNCVC-24–02 of 2016 filed by the appellants/defendants ('the defendants') ('the defendants' appeal') on the issues of liability and quantum.

BRIEF FACTS

[2] The plaintiff's claim in the sessions court is for special damages, general damages, interests and costs for loss arising from a road accident which occurred on 23 April 2011 at about 3–3.05am between the plaintiff, as a pedestrian, and the motorcycle bearing registration No WUP7643 ('motorcycle') which was ridden by the first defendant on the road which the plaintiff alleged is infront of Shangri-La Hotel, Jalan Sultan Ismail, Kuala Lumpur. As a consequence of the accident, the plaintiff suffered serious injuries and losses.

[3] The second defendant is the owner of the motorcycle. He is the first defendant's father, and also a police officer.

DECISION BY THE TRIAL JUDGE

Regarding liability

[4] The trial judge found the plaintiff negligent by 20%, and the defendant negligent by 80%.

Regarding quantum

[5] The trial judge awarded the following quantum.

Special damages:

(a) medical costs (1/3 x RM183,347.42) — RM61,115.80 was allowed because the plaintiff could get treatment at a government hospital at minimum costs;

(b) expenses for speech therapy — RM33,978.00 was allowed;

(c) expenses for future speech therapy was not allowed because there was no definite period fixed by any specialist on this. No specialist report was produced to prove that the plaintiff requires treatment for life;

(d) bill for treatment at Hospital Kuala Lumpur ('HKL') — RM135 was allowed;

(e) expenses for return trips made by family members when visiting the plaintiff — RM500 was allowed;

(f) costs of police report, search with JPJ on sketch plan — RM40 was allowed;

(g) costs of medical report from HKL — RM40 was allowed;

(h) damage to clothes — RM50 was allowed; and

(i) other claims not allowed due to lack of evidence.

Total special damages: RM61,880.80.

General damages

[6] The trial judge awarded general damages as follows:

(i) trauma head injury (GCS 13/15, bilateral periorbital haematoma, left frontal and temporal skull vault fractures extending to sphenoid wing, fractures of orbits, maxillary, ethmoid and frontal sinuses, epidural haematoma, left frontal and left temporal contusions and subarachnoid haemorrhages, right upper limb weaknesses and dysphasia, cranieotomy and tracheostomy done, right sided hemiparesis, impaired immediate and short term memory, impaired concentration, independent of all activities of daily living, impaired of speech, able to walk independently and able to reason and make sensible judgements) — RM160,000 dibenarkan.

(ii) total blindness of left eye — RM80,000 dibenarkan; and

(iii) scars (Laceration would at left eye brow 3 x 2cm and 20 cm scar at left fronto temporal region of scalp behind the hairline, tracheostomy scar and bruises over the face abdomen and right knee with abrasions over his left flank and face) — RM7,000 dibenarkan.

Jumlah gantirugi am: RM247,000

Jumlah ganti rugi am yang dibenarkan oleh mahkamah adalah berdasarkan *Revised Compendium of Personal Injury Awards* bertarikh 17 April 2014 dan kecenderungan award dalam kes semasa yang telah diputuskan oleh mahkamah.

Loss of future earnings

[7] The trial judge awarded loss of future earnings as follows:

C. Kehilangan Pendapatan Masa Hadapan —

Pendapatan bersih yang diterima oleh plaintif setiap bulanan adalah sebanyak RM3,045.10. Daripada jumlah ini sudah tentunya plaintif akan menggunakan pendapatan ini untuk perbelanjaan sara hidup seperti petrol, tol, makan minum, pakaian, bil dan kegunaan peribadi lain dari semasa ke semasa mengikut keperluan dan kehendak. Mahkamah bersetuju dengan kiraan peguam defendan yang pada pendapat mahkamah adalah wajar dan munasabah bagi tolakan saraan hidup sebanyak RM1,200 untuk yang berikut:

– Kos petrol dan tol dari Subang Jaya ke Kuala Lumpur untuk sehari RM30 selama 24 hari bekerja = RM720

– Kos makan minum di tempat kerja RM20 x 24 hari bekerja = RM480

Bagi jumlah kehilangan pendapatan Mahkamah membenarkan untuk tempoh 15 tahun 4 bulan dan jumlah kehilangan pendapatan yang dibenarkan adalah berikut:

– RM3,045.10 – RM1,200 (jumlah sara hidup)

= RM1,845.10 x 15 tahun 4 bulan = RM339,498.40.

Jumlah kehilangan pendapatan masa hadapan: RM339,498.40.

Interests and costs

[8] The trial judge awarded interests and costs as follows:

D. Faedah:

(i) 2.5% setahun atas ganti rugi khas dari tarikh kemalangan hingga tarikh pemfailan saman;

(ii) 5% setahun atas ganti rugi am dari tarikh penyerahan saman hingga tarikh penghakiman; dan

(iii) 5% setahun atas keseluruhan jumlah penghakiman dari tarikh penghakiman hingga penyelesaian penuh.

E. Kos:

Ikut Skala.

SUMMARY OF TRIAL JUDGE'S AWARD ON QUANTUM

[9] In summary, on a 100% liability, the trial judge awarded the plaintiff the following:

General damages		
1.	Global award for head Injury	RM160,000
2.	Blindness (eye)	RM80,000
3.	Lacerations and scarring	RM7,000
	Total	RM247,000
Special damages		
1.	Speech therapy	RM33,978
2.	Medical expenses	RM61,115.80
3.	Transportation (medical treatment)	RM500
4.	Loss of Clothing	RM500
5.	Costs of reports	RM80
6.	Hospital bills at HKL	RM135
	Total	RM95,858.80

Loss of Earnings

RM1,845.10 per month x 49 months = RM90,409.90 (pre trial)

RM1,845.10 x 135 months = RM249,088.50 (no interest).

A THE HIGH COURT'S DECISION ON THE PLAINTIFF'S APPEAL AND THE DEFENDANT'S APPEAL

[10] On 26 September 2016, after having heard the above two appeals together, I gave the following decision:

B

(a) regarding liability:
I dismissed the appeal of the respective appellant regarding liability, and affirmed the decision of the learned sessions court judge on liability of 80% negligence by the first defendant, and 20% contributory negligence by the plaintiff.

C

(b) regarding quantum:
I allowed the appeal of the appellant regarding quantum only as follows.

D

At p 19 of the judgment of the trial judge:

(c) regarding A: *gantirugi khas*

(i) *kos perubatan* to be awarded ought to be (1/3 x RM150,000) – RM50,000 should be awarded, instead of RM61,115.80; and

E

(ii) the award of RM33,978 for speech therapy is affirmed as a separate award, in view of the variation in (i) above.

(d) regarding general damages:
For trauma head injury, the plaintiff's appeal to have a separate award for craniotomy and cranioplasty is dismissed.

F

(e) regarding C: for loss of future earnings
The sum awarded by the trial judge is affirmed. The deduction of RM1,200 for costs to earn the income is rightly considered by the trial judge and properly deducted.

G

(f) regarding EPF:
The plaintiff's appeal for EPF contributions from both the employer and the employee is dismissed.

H

(g) regarding costs of the two appeals:
I ordered that costs are to be borne by the respective parties.

I APPEAL BY THE PLAINTIFF AND THE DEFENDANTS RESPECTIVELY REGARDING THE HIGH COURT'S DECISION

[11] The plaintiff and the defendants respectively are now appealing the whole of my decision in regard to liability and quantum.

GROUNDS FOR THE HIGH COURT'S DECISION

Regarding liability

[12] At the time of the accident, the first defendant was 17 years old, and riding the motorcycle without a licence.

[13] The first defendant testified that at the material time he was coming from Jalan Bukit Bintang to go back to his home in Pantai Dalam. He passed Wisma Genting and the junction at Jalan Raja Chulan.

[14] The defendants' appeal on liability is premised on the contention that the accident occurred at the place marked Y (on the left) by the first defendant in the sketch plan (*RR* p 185) which the first defendant alleged is infront of the Caltex station ('Caltex') and facing the Hard Rock Cafe and Concorde Hotel which are across the road. Caltex is at about 50–60 metres down the road from Shangri-La Hotel, and on the same side of the road as Shangri-La Hotel. The first defendant further alleged that the plaintiff and his friend were crossing at the middle of the road, and failed to use the pedestrian crossing which was about 30 metres from the place of the accident. The first defendant denied that there was a traffic light at the place of the accident. According to the first defendant, when the two male persons (ie the plaintiff and SP3) were in the middle of the road, suddenly another motorcycle came from nowhere and went infront of the two male persons. One of the male persons (ie the plaintiff) retreated or went backwards to avoid being knocked by the other motorcycle. The first defendant knocked him accidentally. The first defendant panicked so he went straight home.

[15] The defence is that the first defendant was not negligent at all in the accident with the plaintiff. The defendants relied on a whole host of authorities and legal principles, and the Highway Code Part IV s 69 on pedestrians which show that the court is more inclined to dismiss a plaintiff's claim if the plaintiff puts himself in a dangerous situation by not using the pedestrian crossing.

[16] From a perusal of the judgment of the trial judge and the appeal record, it is clear that the trial judge had considered all material evidence and applied the law accordingly.

[17] The trial judge evaluated SP3's evidence. SP3 is the plaintiff's friend. He was crossing the road with the plaintiff when the accident happened. SP3's police report (*RR* p 186) clearly states that SP3 and the plaintiff were crossing the road infront of Shangri-La Hotel when suddenly the first defendant's motorcycle knocked down the plaintiff. The first defendant immediately ran away. In fact, SP3 was precise in his testimony. He said '... We walked from

Shangri-La Hotel on to Jalan Sultan Ismail at the Jalan P Ramlee/Jalan Sultan Ismail traffic light junction ...' (*RR* p 140). In examination-in-chief, he said that they had gone across the road, and the pedestrian crossing was there (*RR* p 33). However, in his police report, SP3 did not state that he and the plaintiff were crossing the road at the traffic light, and they had used the pedestrian crossing. His explanation is that after the accident, the plaintiff went into the ICU. SP3 immediately went to the Pondok Polis to report the accident. It was a nervous and 'cemas' time for him because the plaintiff was in the ICU in the hospital (*RR* pp 35 and 71). Therefore, he did not state in his police report that he and the plaintiff were crossing on the pedestrian crossing. Neither did he state in his police report that the first defendant's motorcycle beat the traffic light. However, that that was his evidence in court.

[18] In *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 at p 121, the High Court of Malacca held:

> To this I would say that the report does not and will not contain everything under the sun. It is merely the first step to bring the police machinery into effect.

[19] According to SP3, he and the plaintiff had observed that the traffic light was red for cars, and then crossed the road from Shangri-La Hotel. However, the first defendant hit the lights at high speed. Before SP3 could react, he heard a load crashing sound. When SP3 turned to the left he observed that the plaintiff had been thrown back to the pavement.

[20] In my opinion, SP3's police report is a contemporaneous document, and ought to be accepted. SP3 lodged his police report on the same day as the accident ie on 9 April 2011 at 4.54am. The accident occurred at 3.35am. Therefore, SP3's police report was lodged 1 hour 19 minutes after the accident when the incident was still fresh in SP3's mind. It would probably be accurate. Even if SP3 did not mention the traffic light and pedestrian crossing, the important fact that he stated in his police report is that he and the plaintiff were crossing the road infront of Shangri-La Hotel. Therefore, it is probable that he and the plaintiff had crossed at the traffic light where the pedestrian crossing is.

[21] On the other hand, the first defendant's police report is not a contemporaneous document. The first defendant only lodged his police report on 17 April 2011 ie eight days after the accident. Nowhere in his police report did the first defendant state that the accident took place infront of Caltex, and near the Hard Rock Cafe and Concorde Hotel. Clearly, the first defendant's version of the place of the accident is an afterthought which cannot be accepted by the court.

[22] Neither SP3 nor the first defendant mentioned the existence of the pedestrian crossing in their police reports. In my opinion, it is more probable

that the plaintiff and SP3 were crossing the road infront of Shangri-La Hotel, and not at Caltex facing Hard Rock Cafe and Concorde hotel as alleged by the first defendant. It is also noted that the plaintiff's pleaded case is that the plaintiff and SP3 were infront of Shangri-La Hotel and had ensured that the traffic light from the right was red and it was safe before they crossed the road (see para 4 of the plaintiff's statement of claim, *RR* p 14).

[23] The IO/SP1's evidence is based on what the first defendant told him. Thus, any part of SP1's evidence, which is based on hearsay cannot be accepted. SP1 testified that on 18 April 2011 he went with the first defendant who showed him where the place of accident was. SP1 could not find any marks left from the accident.

[24] SP1 did not take any statement from the plaintiff and SP3. SP1 stated that SP3 never answered his telephone calls to see him to give a statement. On the other hand, SP3 stated that for the first time, he waited for the IO for five or six hours but did not get to see the IO. After that he did not receive any telephone calls from SP1. Be that as it may, it is clear that SP1's investigations are not complete.

[25] SP1 had marked the position of the Shangri-La Hotel as X in the sketch plan. He stated that the plaintiff and SP3 did not cross the road by using the pedestrian crossing. According to him, the pedestrian crossing is 30 metres from Shangri-La Hotel. It must be noted that SP1 was not at the scene of the accident. He merely relied on what the first defendant and the second defendant (ie a police officer, and also the first defendant's father) had told him. SP1's evidence cannot be used against the plaintiff, that the plaintiff did not use the pedestrian crossing.

[26] From the evidence of SP3, the first defendant and SP1, it is clear that there are two pedestrian crossings. The first one is at the traffic light infront of Shangri-La Hotel where the plaintiff and SP3 had used to cross the road ('first pedestrian crossing'). The second one is closer to Caltex, about 30 metres further down the road ('second pedestrian crossing').

[27] The trial judge made a finding of fact, based on SP3's evidence, that the plaintiff and SP3 were crossing the road because they wanted to go across to where the plaintiff had parked his car. They were crossing from Shangri-La Hotel to the opposite side. However, even after making that finding, the trial judge then fell into error by stating that the plaintiff did not use the pedestrian crossing there. The trial judge ought to have accepted SP3's evidence that he and the plaintiff were using the pedestrian crossing there. It did not strike the

trial judge that the plaintiff and SP3 were using the first pedestrian crossing, but the first defendant and SP1 were referring to the second pedestrian crossing.

[28] SP3's police report and evidence ought to have been considered in preference to the first defendant's evidence because the first defendant made his police report eight days later. Not only that, the first defendant immediately ran away after the accident, thereby showing that what SP3 is telling is probably the truth, ie that the first defendant hit the lights at high speed. Therefore, the first defendant is clearly more blameworthy than the plaintiff.

[29] The trial judge made a finding of fact that the first defendant was speeding. This shows that the first defendant was negligent in riding the motorcycle at high speed at 3.35am at night when the traffic was light. Under cross-examination, the first defendant stated that he stopped when the traffic light was red. He only moved when the traffic light was green. He admitted under cross-examination that if he was not riding fast, he could have avoided the accident when the male person (ie the plaintiff) retreated or went backwards.

[30] The trial judge ought to have given importance to the evidence of the plaintiff's father ('SP5'). SP5 testified that after the accident he went to pick up the plaintiff's car which was parked across the beach club, just directly opposite Shangri-La Hotel (*RR* p 79). SP5's evidence therefore corroborates SP3's evidence that SP3 and the plaintiff were crossing the road infront of Shangri-La Hotel to go to the other side where the plaintiff's car was parked, near the beach club. The evidence of SP3 and SP5 taken together show that the first defendant was not telling the truth when he alleged that the accident happened infront of Caltex, facing Hard Rock Cafe and Concorde Hotel, which was 50–60 metres further down the road.

[31] Under cross-examination, the first defendant admitted that 'Beach club di traffic light simpang empat belah kanan' (*RR* p 104). This evidence of the first defendant in fact confirms the truth of the evidence of SP3 and SP5. Clearly, it is more probable that the plaintiff and SP3 were crossing the road at the traffic light infront of Shangri-La Hotel to go to the other side near the beach club where the plaintiff had earlier parked his car.

[32] Upon a thorough perusal of the evidence in totality, it is obvious that the first defendant is more negligent than the plaintiff. I do not think that the trial judge had erred in deciding liability of 20% to the plaintiff and 80% to the defendants.

[33] There is therefore no good reason for this appellate court to interfere with or overturn such decision.

REGARDING QUANTUM

[34] The plaintiff's notice of appeal regarding quantum are in respect of the following issues:

(b) Menolak Rayuan Plaintif terhadap keputusan Hakim Mahkamah Sesyen yang tidak memberikan dan mengambil kira sumbangan Kumpulan Wang Simpanan Pekerja apabila mengira kehilangan pendapatan masa hadapan Plaintif;

(c) Menolak Rayuan Plaintif terhadap keputusan Hakim Mahkamah Sesyen yang hanya membenarkan 1/3 daripada jumlah kos perubatan yang dibayar oleh Plaintif;

(d) Menolak Rayuan Plaintif terhadap awad Gantirugi Am akibat daripada kecederaan di bahagian otak dinaikkan kepada RM250,000.00;

(e) Menolak Rayuan Plaintif untuk awad Gantirugi Am akibat daripada kecederaan dan keretakkan tulang bahagian muka sebanyak RM50,000.00;

(f) Menolak Rayuan Plaintif untuk awad Ganti rugi Am akibat daripada pembedahan Craniotomy dan Cranioplasty;

[35] The issues raised by the defendants regarding quantum in the appeal before me are:

(a) whether the trial judge had erred in giving awards to the plaintiff which are exorbitant, in particular for head injury;

(b) whether the trial judge had erred in awarding RM33,978 for speech therapy even though this sum had been awarded together with the medical costs of RM183,347.92; and

(c) whether the trial judge had erred to award total loss of earnings to the plaintiff without taking into account the evidence of the plaintiff's father that the plaintiff, at the time of the trial, served as a volunteer at the National Stroke Centre ('NSC').

REGARDING EPF

[36] The trial judge made no mention of the plaintiff's claim for EPF.

[37] Learned counsel for the plaintiff relied on the following two High

Court decisions which allowed the employees provident fund ('EPF') benefits to be awarded to the plaintiff:

Soh Hau Huat v Mohd Nor Taya & Anor [1992] 3 CLJ Rep 600 where Lim Beng Choon J held:

> [2] In assessing loss of earnings of the deceased the probable living expenses should be deducted (*White and another v London Transport Executive* [1982] 1 All ER 410; [1982] 1 WLR 79 — relied). However deceased's contribution to his dependants should not be taken into account *(Noorianti bte Zainal Abidin v Tang Lai Nge* [1992] 2 MLJ 242 — relied). Also, the plaintiffs *were entitled* to be compensated for the loss of *contribution to EPF*. (Noor Azahar bin *Noor Azahar Habin v Rajaswari Sithampara Pillai & Anor* [1991] 3 CLJ Rep 339 — relied) ... (Emphasis added.);

Lau Kung Kai v Abu Serah bin Bol (M) [2008] MLJU 352; [2008] 10 CLJ 245 where Hamid Sultan Abu Backer JC (as he then was) held:

> (3) The complaint that the EPF contribution must not be taken into account had no merits when the purpose was to assess a suitable multiplicand in a dependency claim. *Courts have even considered EPF contribution* in cases other than dependency claims. (para 13). (Emphasis added.)

[38] Learned counsel for the plaintiff referred to the evidence of SP2 (the plaintiff's employer) (*RR* pp 135–138, and pp 62–66) where SP2 confirmed the details of the plaintiff's pay slips (*RR* pp 188–200). He submitted that these pay slips clearly reflect that the plaintiff's contributions per month to EPF is RM385, and the employer's contribution per month is RM455 (*Total = RM840 per month*).

[39] Learned counsel for the plaintiff submitted that there had been judicial error by the trial judge in not allowing the following:

RM840 per month x 49 months = *RM41,160* (pre trial) with interest

RM840 per month x 135 months = *RM116,760* (no interest)

TOTAL RM157,920 (award for EPF).

[40] There were no submissions by learned counsel for the defendants on the issue of EPF.

[41] I observe that the above two High Court decisions relied on by the plaintiff are in respect of a dependancy claim brought by the estate of the deceased pursuant to a fatal accident. Therefore, they ought to be distinguished

from the present case where the plaintiff is still surviving after the accident. No Court of Appeal decision has been cited by learned counsel for the plaintiff to assist this court. In my opinion, there is no legal provision to make it mandatory for an award of EPF to be given in a case like the present case where the plaintiff stopped working after the accident. Thus, an award for EPF can only be granted pursuant to an exercise of discretion by the court.

[42] However, I hold the view that the plaintiff in the present case is not entitled to an award for EPF since he has not been paid the 'amount of wages' and 'wages', as defined in s 2 of the EPF Act 1991, pursuant to his employment under a contract of service (see definition of 'employee' under s 2 of the same Act). SP2, the plaintiff's employer, confirmed that after the accident on 23 April 2011, the plaintiff did not go back to work. Notwithstanding that, the plaintiff's employer continued to pay him for about a year after the accident. SP2 confirmed that the last date that the plaintiff was paid his salary was on 29 February 2012 (the plaintiff's *RR* pp 68 and 137). After 29 February 2012 up to 31 May 2013, the plaintiff was on unpaid leave. The plaintiff's last day of employment was 31 May 2013 (the plaintiff's *RR* pp 68–70). In my opinion, it is only when the plaintiff is employed under a contract of service and is paid the amount of wages, or wages, then s 43 of the EPF Act 1991 is triggered to require the employer and employee to make their respective statutory contributions for EPF for the plaintiff, as the employee. If the plaintiff was not working and was not paid a monthly salary, there is no legal requirement for EPF contributions to be made. Therefore, the court cannot award the plaintiff for EPF when he is not employed, or is an employee within the meaning of the EPF Act.

[43] In my view, it is clear that the intention of the Legislature in enacting the EPF Act 1991 is to cover only employees who are in employment under a contract of service and are paid a monthly salary. Hence, there is no judicial error when the trial judge did not make any award for EPF to the plaintiff since the plaintiff was not working after the accident, particularly after 29 February 2012 which is the last date that he was paid his salary by his employer.

REGARDING GENERAL DAMAGES FOR TRAUMA HEAD INJURY, AND NO AWARD FOR FACIAL FRACTURES, AND NO SEPARATE AWARD FOR CRANIOPLASTY

[44] The plaintiff appealed for the award of RM160,000 for general damages for head injury to be increased to RM250,000. The defendants contended that the amount ought to be reduced to RM50,000 based on the revised compendium on personal injury award where for 'hemiplegia', a range of RM44,000–RM71,500 is to be awarded where the person cannot move his body.

[45] However, in the case of the plaintiff, the defendants submitted that the plaintiff has recovered and is able to walk as usual. In addition, in the specialist report, Dr Dharmendra (*RR* p 343) stated that the plaintiff can answer questions and make 'sensible judgment' without assistance. The defendants relied on the following cases:

In *Noor Asfizatul Ain bt Jamaluddin v Vicent Lai* [2005] 1 PIR 19, the court awarded RM50,000.00 for 'head injury with subdural haemorrage at right frontal region with punctuate haemorrage and post concussion syndrome';

In *Muhamad Adib v Mohamad Azrul bin Ahmad* [2015] 1 PIR 55, the court awarded RM40,000 for 'head injury with memory impairment, giddiness, personality changes, impairment of cognitive function';

In *Tengku Muhamad Hidayatullah bin Tengku Amran v Muhamad Syakir bin Ab Wahab* [2015] 2 PIR 26, the court awarded RM50,000 for 'severe head injury with skull fractures'.

[46] There was no separate award by the trial judge for facial fractures. The plaintiff submitted that there should be a different and separate award of RM50,000 for facial fractures which are orthopedic injuries, and not brain injuries.

[47] It appears to me that the trial judge had awarded the global sum of RM160,000 as general damages for trauma head injury, which includes the facial fractures. The judge had taken into account the plaintiff's impaired immediate and short term memory, impaired concentration, and impairment of speech, even though the plaintiff can walk independently, is independent in his daily living activities, and is able to reason and make sensible judgments. It is also an undisputed fact that during the trial, when the plaintiff took the witness's stand he was unable to testify in view of his medical condition. He could not remember anything. The plaintiff relied mainly on the evidence of SP3 and the plaintiff's father ('SP5') to prove his claim.

[48] In addition, the plaintiff had also appealed to have a separate head of award of RM27,500 (ie separate from the award for craniotomy) for cranioplasty which is a separate procedure which had to be done after the initial surgery. However, I noted that in the court below, the plaintiff had already made submissions regarding craniotomy and cranioplasty. The trial judge had considered craniotomy and cranioplasty separately and yet came up with the award for a global sum which only mentions craniotomy. Therefore, I did not allow the plaintiff's appeal to have another separate award for cranioplasty.

[49] I am of the view that when granting general damages, the trial judge did not make any wholly erroneous estimate or award. She considered the medical and specialist reports of the plaintiff, and had based her award on the revised compendium of personal injuries dated 17 April 2014, after considering the submissions of both parties, and the current trends for awards given by the courts.

[50] In my opinion, the award of RM160,000 is reasonable and fair, bearing in mind the plaintiff's serious head injury and the plaintiff's impairment of memory and speech, and the plaintiff's facial fractures. There is no good reason to increase the award to RM250,000. Had the trial judge agreed with the submissions of learned counsel for the defendants, then she would have awarded at the most the sum of RM71,500 for the plaintiff's trauma head injury. This amount, if added to the RM50,000 for facial fractures which the plaintiff is now appealing for, would result in total general damages of RM121,500 (ie for trauma head injury and facial fractures taken together). The sum of RM121,500 is much lower than the award of RM160,000. I hold the view that the award of RM160,000 given by the trial judge ought to be maintained.

REGARDING THE AWARD ALLOWING ONLY 1/3 OF THE TOTAL MEDICAL COSTS PAID BY THE PLAINTIFF, AND AWARD FOR SPEECH THERAPY

[51] Both learned counsels agree that there was an error made by the trial judge by including the RM33,978 for speech therapy in the medical costs.

[52] It is acceptable that the medical costs to be awarded should be 1/3 of RM150,000 = RM50,000 (the 1/3 formula was adopted since that would be what a government hospital would charge). However, the medical costs should not include the RM33,978 for speech therapy thereby causing the medical costs to go up to RM183,347.92. I therefore varied the award for medical costs to be reduced to RM50,000, instead of RM61,115.80. The 1/3 formula cannot be used for the award for speech therapy. It can only be applied to the medical costs.

[53] It is clear from the trial judge's finding of fact that the plaintiff suffers from impairment of speech and therefore would require speech therapy.

[54] I therefore affirmed the award of RM33,978 for speech therapy, but varied the order, and allowed it under a separate head from medical costs. This is for the reason that speech therapy is given after the plaintiff's surgery and medical treatment. That being the case, the award for speech therapy cannot be included in the medical costs, but ought to be given as a separate award.

[55] There is no evidence to show that the award of RM33,978 is excessive or erroneous. Thus, the quantum should be maintained.

Regarding loss of future earnings: Whether the plaintiff's volunteer work should be taken into account to calculate the plaintiff's loss of future earnings, and whether the costs of earning the income should be deducted from the plaintiff's income for the calculation of the loss of future earnings

[56] In *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 at p 325 the Federal Court laid down the principle for awarding loss of earnings and profits as follows:

> (4) the general principle is that an injured plaintiff is entitled to damages for the loss of earnings and profits which he has suffered by reason of his injuries up to the date of trial and for the loss of the prospective earnings and profits of which he is likely to be deprived in the future.

[57] Regarding the plaintiff's future employment, Dr Dharmendra in his specialist report stated that 'the potential to be employed in that position or similar jobs is slim considering his current neurological deficit'.

[58] Thus, the trial judge had correctly awarded loss of future earnings to the plaintiff.

[59] It is true that in her judgment, the trial judge made no mention of the evidence of the plaintiff's father (SP5) that at the time of the trial, the plaintiff served as a volunteer at the NSC.

[60] However, as submitted by learned counsel for the plaintiff, at the time of the trial, it was about three years and nine months after the accident. Yet, at that time the plaintiff had, inter alia, the following problems:

(a) difficulty in expressing himself, word finding difficulties, undergoing speech therapy;

(b) slow at counting, difficult to read and understand;

(c) finding it difficult to converse in Bahasa Malaysia;

(d) occasional headaches;

(e) forgetful;

(f) angry and depressed at times;

(g) cannot drive;

(h) cannot play badminton and difficult to aim at the shuttle-cock; and

(i) right upper limb weakness; right hand dexterity is reduced.

(*RR* of the plaintiff, pp 315 and 318–322, and the plaintiff's submissions pp 14–18).

[61] Thus, it can be safely concluded that even though the plaintiff was doing volunteer work at NSC, it is obvious that in his poor health condition, he could not be gainfully employed. As what the plaintiff's father had testified during cross-examination, 'Volunteering is just mingle around with all the other patients like him as well to give each other support, I'm giving him this opportunity because I don't want him to stay at home under his stage of depression now' (the plaintiff's *RR* p 93). It is highly probable that at that point in time the plaintiff would not be able to perform work as an account manager, in the same manner that he was doing before the accident.

[62] In my opinion, it would be wrong for the trial judge to take into account the plaintiff's volunteer work at the NSC for calculating loss of future earnings considering that the plaintiff was then at the NSC just to mingle around with like patients, and to prevent depression from overcoming him. In any case, it is noted that there is no rebuttal evidence from the defendants to prove that the plaintiff could be gainfully employed at the time of the trial.

[63] As for calculation the loss of future earnings, the trial judge had rightly considered the plaintiff's nett income of RM3,045.10 per month after deducting the costs of earning the income.

[64] In *Ong Ah Long* at p 328, the Federal Court stated that a claim for special damages has to be specifically pleaded, and 'It requires the plaintiff to plead and particularise any item of damage which represents the out-of-pocket expenses or loss of earnings incurred prior to the trial and which is capable of substantially the exact calculation'.

[65] The trial judge agreed with the calculation of the defendant by deducting RM1,200 for living expenses before arriving at the figure of RM1,845.10 to calculate the plaintiff's loss of future earnings ie RM1,845.10 x 15 years four months = RM339,498.40. I am of the view that this is consistent with the principle laid down in *Ong Ah Long*. Here, loss of future earnings can only be awarded as special damages which must be proved. Thus, the cost of earning the income ie the living expenses of RM1,200 must be deducted from the plaintiff's monthly income (see also *Soh Hau Huat*).

[66] To my mind, the award of RM339,498.40 for loss of future earnings is reasonable and ought to be maintained. In fact, this amount can never make up

for the fact that the plaintiff, who has a Bachelor Degree from the University of Technology, Sydney, and was an account manager prior to the accident, is now classified as 'Orang Kurang Upaya' (as per submissions of learned counsel for the plaintiff).

CONCLUSION

[67] For the above reasons, I therefore ordered accordingly.

Decision of sessions court judge on liability affirmed; appeal regarding quantum allowed in part.

Reported by Afiq Mohamad